PUBLIC PROSECUTOR

v.

RAMLI LONG & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[CRIMINAL TRIAL NO. 47-14-92]
24 AUGUST 1992

CRIMINAL LAW: Search - Dangerous Drugs Act, s. 3, s. 37(a), (b), (d) and (g) - Evidence - Custody and control - Occupiers.

A search was made at the Accused persons' house and a hut adjacent to the house. Subsequently both were charged under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 for trafficking 4494 grammes of ganja. The proviso to s. 3 read together with s. 40 of the Juvenile Courts Act, 1947 entitles the High Court to hear the charge against a juvenile and hence the second Accused was brought before the said Court. The prosecution argued that since both the Accused were occupiers of the hut, had the custody or control over it and had the necessary knowledge, they are presumed under s. 37(b), (d) and (g) to be traffickers under s. 37(a).

Held:

[1] In order to invoke s. 37(d) the prosecution must adduce evidence of custody and control of the drugs and under s. 37(g) only knowledge will be presumed. One cannot rely on s. 37(g) if the Accused persons did not have care and management of the hut to consider them as occupiers of the hut under s. 37(b).

[2] Occupancy of the hut cannot be conclusively established by the mere possession of the keys to the hut and the electricity bill.

[3] There was insufficient evidence to establish the ingredient of the offence. The prosecution had failed to make out a *prima facie* case which if unrebutted would warrant their conviction.

[Both Accused acquitted and discharged].

Cases referred to:

Choo Chang Teik & Anor. v. PP [1992] 1 SCR 475 ***(refd)***
Lee Chee Meng v. PP [1992] 1 SCR 483 / [1992] 1 CLJ 345 ***(refd)***
Pang Chee Meng v. PP [1992] 2 SCR 1 ***(refd)***
PP v. Haw Tua Tua [1981] 2 MLJ 49 (PC) ***(foll)***
PP v. Munusamy [1987] 1 MLJ 492 (SC) / [1987] 1 CLJ 250 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(b), (d), (da), (g), 39B(2)
Evidence Act 1950, s. 27
Juvenile Courts Act 1947 (Act 90) ss. 16, 40

For the Public Prosecutor - Shamsul Sulaiman; DPP
For the first Accused - Bhagwan Singh; M/s. Bhagwan Singh
For the second Accused - Gulam Mustaffa; M/s. Gulam Mustafa & Co.

JUDGMENT

Dr. Visu Sinnadurai J:

A police party raided a house, No: 62, Kampung Masjid, Pantai Dalam, Kuala Lumpur (No. 62) at about 2.30 in the morning of the 3 December 1991. A search was conducted of the house and some brown paper; some substance suspected of being ganja (not the subject matter of the present charge), and some smoking paraphernalia were found. There was nothing else recovered from the house except for a bunch keys.

Inspector Lai Joo Wah, who headed the team of police officers, then went to another hut (the pondok) which was adjacent to No. 62. He used one of the keys which he had recovered in No. 62 and unlocked a padlock and entered the pondok. In the corner of the pondok, Inspector Lai found, in the lower compartment of an old disused gas stove, two slabs of substance suspected of being ganja and a plastic bag containing 38 bundles of rolls suspected of containing ganja. Inspector Lai took possession of these items and returned to No. 62. There, Inspector Lai took possession of two electricity bills, one of the bills was for No. 62 which was in the name of Ramli Long and the other for the pondok in the name of one Mat bin Daros, and another set of keys.

Inspector Lai then arrested the four persons found at No. 62: the entire family of the father, mother, son and the daughter.

The present trial concerns that of the father and son only. They are charged for trafficking in dangerous drugs. The charge reads as follows:

> Bahawa kamu bersama-sama pada 3 December 1991 jam lebih kurang 0230 hrs di dalam sebuah pondok, di hadapan rumah No. 62, Kampong Masjid Pantai Dalam Kuala Lumpur, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan, telah mengedar dadah merbahaya iaitu ganja yang beratnya

berjumlah 4494 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah s. 39B(l)(a) Akta Dadah Merbahaya 1952 (semakan Akta 553/83) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

It should be pointed at this stage, that though there were other items recovered by the police at No. 62 at the time of the raid, as they did not form the subject matter of the present charge, the recovery of these items are not relevant for the present purposes. They have, therefore been accordingly disregarded completely for the purposes of this trial. A similar consideration was also adopted by this court as far as the other charges relating to the four arrested persons, especially the mother and daughter were concerned.

Preliminary Point: Second accused a Juvenile
At the commencement of the trial, the court's attention was drawn to the fact that the second accused (the son) was at the date of the alleged commission of the offence under the age of 18. However, as this is a joint charge, this court has the power under the proviso to s. 3 read together with s. 40 of the Juvenile Courts Act 1947 (Act (90), to hear the charge against the second accused even though he was a juvenile within the meaning of the said Act.

As the offence against the second accused carried the mandatory death sentence if found guilty, the effect of s. 39B(2) of the Dangerous Drugs Act 1952, read together with s. 16 of the Juvenile Courts Act 1947, was further explained to the second accused by this court. Section 16 provides as follows:

> Sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was a juvenile: but in lieu thereof the court shall order him to be detained during the pleasure of the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur and the Federal Territory of Labuan ...

Prosecution's Case
The prosecution's main piece of evidence is that as the keys to the pondok and the electricity bill for the pondok were found in the house (No. 62), occupied by the first and second accused, they are both also the occupiers of the pondok. As the drugs were found in the pondok, of which both the accused are said to be the occupiers, they had custody and control over it, with the necessary knowledge, by the application of the presumptions under s. 37(b), (d) and (g), and are therefore deemed to be traffickers under s. 37(da). The prosecution also submitted that there was also direct evidence of occupancy of the pondok by the two accused persons.

Basically, the prosecution's case was based on these grounds only. The prosecution did not rely on any caution statements made by the accused persons or to any evidence under s. 27 of the Evidence Act.

The Law:
For the prosecution to make out a case against the accused persons, the prosecution must establish that both the accused persons had possession of the drugs found in the pondok. To establish possession, it is necessary for the prosecution to establish custody and control of the drugs and also that the accused persons had knowledge of the drugs. This the prosecution may do, either with the aid of the necessary presumptions under s. 37, or by adducing direct evidence. The possibly relevant presumptions for the present purposes are s. 37(b), (d) and (g).

To invoke s. 37(d), the prosecution must first establish that the accused persons had custody and control over 'anything containing any dangerous drugs'. If the prosecution succeeds in proving that the accused persons had custody or control of the drugs found in the pondok, the presumptions of both knowledge and possession will be raised under s. 37(d). To establish custody and control of the drugs, the prosecution therefore must adduce evidence to this effect. It is imperative that there must be a close nexus between the drugs found in the pondok and the accused persons. For this purpose, the prosecution may attempt to rely on the presumptions under s. 37(g). However, it must be stressed, that if this presumption is applicable, only knowledge and not custody and control will be presumed. In any case, before the presumption under s. 37(g) maybe relied upon, it must first be established that the accused persons had care and management of the pondok so as to deem them to be the occupiers of the pondok under the presumption in s. 37(b).

It would therefore be clear that for the prosecution to rely on the presumption under s. 37(d), the prosecution must first establish custody

and control of the drugs found in the pondok, and to rely on the presumption under s. 37(g), the prosecution must show that both the accused had care and management of the pondok so as to deem them to be occupiers under s. 37(b).

Occupiers

To establish custody and control over the drugs found in the pondok or to establish that the accused persons had knowledge of the drugs, the prosecution must establish occupancy of the pondok by the accused persons.

There is, however in the present case, no other evidence to establish occupancy of the pondok by the accused persons, except for the keys found at No. 62 to the door to the pondok and the electricity bill for the pondok being found also at No. 62.

It appears to this court that in the absence of any other evidence, occupancy of the pondok cannot be conclusively established by these two factors alone. There is not an iota of any other evidence of occupancy of the pondok by both accused. There were no personal items found there, the accused persons were not found in the pondok during the time of the raid; nor was there any evidence even to establish that they were at any time seen at the pondok. Even, the evidence of Mat bin Daros, who previously occupied the pondok and whose name still appears on the electricity bill, did not raise any indication that either or both of the accused persons had occupancy of the pondok. The prosecution's case may possibly have been strengthened if the electricity bill to the pondok was in fact in the name of either of the accused persons. The fact remained that it was still in the name of Mat bin Daros. It is even speculative, as defence Counsel raised, as to whether Mat bin Daros himself, still continued to maintain the care and management of the pondok. Further, there is no evidence even to indicate that either of the accused persons had taken over occupancy of the pondok by previously paying the electricity bill for the pondok though it remained in the name of Mat bin Daros.

It should perhaps be emphasised that in the absence of any other evidence, a person should not be implicated merely by alleging that he was the occupier of the premises where the drugs were found. Even in cases where occupancy was established, the Supreme Court in a number of recent cases has exercised caution in holding that the mere presence of drugs in the premise is sufficient to implicate the occupiers of the premise: see *Choo Chang Teik & Anor v. PP* [1992] 1 SCR 475; *Lee Chee Meng v. PP* [1992] 1 SCR 483; and *Pang Chee Meng v. Pendakwa Raya* [1992] 2 SCR 1. What more in cases where there is no clear evidence of occupancy by the accused persons.

Conclusion

From the given evidence, the prosecution had a difficult task of establishing possession of the drugs by both or either of the accused persons. The available evidence was insufficient for the prosecution to successfully establish any of the necessary ingredients of the offence.

It cannot therefore be said that the accused persons had custody and control of the drugs or even had knowledge of it, either by the application of the presumptions or by any direct evidence.

On this ground alone, it appears to me sufficient to hold that the prosecution had failed to make out a *prima facie* case against either or both of the accused persons, which if unrebutted would warrant their conviction.

Therefore, applying the principles enunciated in *PP v. Haw Tua Tua* [1981] 2 MLJ 49 (PC) and *PP v. Munusamy* [1987] 1 MLJ 492 (SC), I hold that no *prima facie* case has been made out against either the first or the second accused. I therefore acquit and discharge both the first accused and the second accused.

All exhibits to be retained pending the expiration of any appeal against this decision.